No. 06-549

IN THE

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF KERN COUNTY WATER AGENCY, LOST HILLS WATER DISTRICT, WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT, ENTERPRISE IRRIGATION DISTRICT, KLAMATH BASIN IMPROVEMENT DISTRICT, KLAMATH DRAINAGE DISTRICT, KLAMATH IRRIGATION DISTRICT, KLAMATH HILLS DISTRICT IMPROVEMENT CO., MALIN IRRIGATION DISTRICT, MIDLAND DISTRICT IMPROVEMENT CO., PINE GROVE IRRIGATION DISTRICT, POE VALLEY IMPROVEMENT DISTRICT, SHASTA VIEW IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, TULELAKE IRRIGATION DISTRICT, AND WESTSIDE IMPROVEMENT DISTRICT NO. 4 IN SUPPORT OF PETITIONER

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BRIEF OF SEVENTEEN WATER DISTRICTS AS AMICI CURIAE SUPPORTING PETITIONER

Amici curiae respectfully submit that the judgment below should be reversed.[1]

INTERESTS OF AMICI CURIAE

Amici curiae are seventeen water districts in Oregon and California, each of which holds the state-granted right to receive water under state law. Each has already lost some of the water granted to it by state law as a result of the application of the federal Endangered Species Act (ESA). A decision of this Court expanding federal authority under Section 7 of the ESA would further reduce their already impaired state-granted water rights.

Amici curiae, Tulare Lake Basin Water Storage District, Wheeler-Ridge Maricopa Water Storage District, Lost Hills Water District, and Kern County Water Agency, are located in the Central Valley of California. Each of these amici is the beneficiary of water rights granted by the California State Water Resources Control Board. Tulare Lake Basin Water Storage District and Kern County Water Agency have contracts directly with the State Water Project. Lost Hills Water District and Wheeler Ridge-Maricopa Water Storage District, in turn, have subsidiary contracts with the Kern County Water Agency. Amici supply water for agricultural, municipal, and industrial uses. They

[1] Pursuant to this Court's Rule 37.6, the amici state that no counsel for a party authored this brief in whole or in part. No one other than the counsel of the amici made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

successfully sued the federal government in the United States Court of Federal Claims to recover just compensation under the Fifth Amendment for the taking of their water to protect two species of fish listed as endangered under the federal ESA. *See Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001).

Amici curiae, Enterprise Irrigation District, Klamath Basin Improvement District, Klamath Drainage District, Klamath Hills District Improvement Company, Klamath Irrigation District, Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Tulelake Irrigation District, and Westside Improvement District No. 4, are located in the Klamath Basin of southern Oregon and northern California. Each of these amici is the beneficiary of water rights granted by the Oregon Water Resources Department. These districts supply water to several towns, as well as approximately 176,000 acres of farmland. These amici have sued the federal government in the United States Court of Federal Claims in order to recover just compensation under the Fifth Amendment for the taking of their water to protect three species of fish listed as endangered under the federal ESA. *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504 (2005). This case is pending.

STATEMENT OF THE CASE

The Clean Water Act (CWA) limits the Environmental Protection Agency's (EPA) authority to deny a State the ability to take over the Clean Water Act pollution permitting program within its borders from the federal EPA. The CWA provides that the EPA "shall" transfer pollution permitting authority, under the National Pollution Discharge Elimination System, to a State, if the State's proposal

requesting transfer meets nine statutory criteria. *See* 33 U.S.C. § 1342(b). None of the nine statutory criteria involves endangered species or refers to the Endangered Species Act. Nevertheless, the court of appeals held that the ESA supersedes a State's right under the CWA to administer water pollution permitting within its borders regardless of whether the State's proposal meets the nine criteria.

Thus, the court of appeals remanded back to the EPA the EPA's decision to transfer pollution permitting authority to the State of Arizona, despite the fact that there is no dispute that Arizona's proposal met all nine statutory criteria. Indeed, the Fish and Wildlife Service issued a biological opinion determining that any impact transfer would have on endangered species was the result of: (1) Congress' decision to make Section 7 of the ESA inapplicable to the States; and (2) Congress' decision to require transfer of the permitting process to the States, provided the nine criteria were met (none of which included consideration of endangered species). *Defenders of Wildlife v. EPA*, 450 F.3d 394, 396 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc)

The court of appeals, however, incorrectly rejected the agency's interpretation of the ESA as it applies to the transfer provision of the CWA. The court of appeals held that "the EPA did have the authority to consider endangered species in making the transfer decision, and erred in determining otherwise." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 950 (9th Cir. 2005). Accordingly, the court of appeals determined that under the Administrative Procedures Act, EPA's decision was arbitrary and capricious.

The court of appeals decision was erroneous, and, more importantly, has far-reaching effects on the scope of the ESA. As Judge Kozinski stated in dissent from the denial of

rehearing en banc, the court of appeals' "holding—that the ESA imposes an affirmative duty on a federal agency to protect endangered species, even in the face of a governing statute that explicitly precludes the agency from doing so—contradicts FWS's statutory interpretation, ignores the very recent instructions of the Supreme Court, and creates a conflict with two other circuits." *Defenders of Wildlife*, 450 F.3d at 401 (Kozinski, J., dissenting from denial of rehearing en banc).

The effects of the court of appeals decision go well beyond the CWA pollution permitting transfer decision at issue in this case. If allowed to stand, the court of appeals decision will have lasting effects on other programs administered by the States. In particular, the decision will permit, and in some instances could force, federal agencies to interfere in a State's water allocation decisions. This is because the decision holds that "*any* action which comes within a federal agency's decisionmaking authority falls within the scope of Section 7(a)(2) of the Endangered Species Act." 420 F.3d 946, 979 (9th Cir. 2005) (Thompson, J., dissenting). Traditionally, however, it has been understood that water allocation within a State comes within that State's authority—not the authority of the federal government. The court of appeals' decision thus threatens that traditional understanding.

SUMMARY OF ARGUMENT

Interpreting the Endangered Species Act as a generic grant of additional legal power to every federal agency at the expense of the States' authority (as the court of appeals did in this case) will upset the delicate process of allocating the nation's precious water resources, a power thus far reserved to the States. Although Section 7 of the ESA certainly requires that federal action agencies utilize their existing

statutory authority to protect endangered species, nothing in the language or history of that provision suggests that Congress intended by that section to impliedly repeal all limitations on federal agency authority where species protection is concerned. Indeed, the Clean Water Act itself demonstrates Congress' intent that traditional state functions, including water allocation, should not be disturbed. Clean Water Act, 33 U.S.C. § 1251(g) (providing "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter").

In this time of growing scarcity in the nation's freshwater resources, States are struggling to conserve water and to distribute it in the most efficient and fair manner possible. The court of appeals' cavalier disregard of state primacy in water allocation (as well as pollution control) ignores this Court's repeated observation that through the history of Western water allocation runs the consistent thread of congressional deference to state water law. *California v. United States*, 438 U.S. 645, 653 (1978).

As Judge Kozinski noted in his dissent from the denial of rehearing en banc, adoption of the rule announced by the court of appeals would affect a vast array of established programs, in addition to state delegation under the Clean Water Act: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife*, 450 F.3d at 399 n.4 Kozinski, J., dissenting from denial of rehearing en banc). One such program is the allocation of water supplies for municipal, industrial, and agricultural use across the country, but especially in the arid West; in fact, the rights of water users have already come into conflict with the Endangered Species Act, resulting in extensive litigation.

See, e.g., Orff v. United States, 545 U.S. 596 (2005); *Bennett v. Spear*, 520 U.S. 154 (1997); *Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005); *Westlands Water Dist. v. Dept. of Interior*, 376 F.3d 853 (9th Cir. 2004); *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).

A decision by this Court in favor of respondent and upholding the court of appeals' ruling would unhinge the intricate legal machinery that has so far governed the allocation of limited supplies of fresh water, and possibly implicate constitutional issues of federalism as well. These amici, who have found themselves struggling to provide supplies to their water users in the face of limitations imposed under Section 7 of the ESA, urge this Court to reject respondent's argument that this provision of the ESA impliedly repealed the statutory and jurisprudential limitations on federal agency power to disrupt the States' long-recognized statutory (and perhaps constitutional) authority to allocate the water flowing within their borders.

ARGUMENT

I. The Endangered Species Act Has Already Clashed with Amici's State-Created Water Rights

This Court has already seen cases arising out of the conflict between the water demands for endangered fish and the state-created water rights of people. In *Bennett v. Spear*, 520 U.S. 154 (1997), this Court found that Klamath water users had standing to challenge a biological opinion that impaired their water rights, and in *Orff v. United States*, 545 U.S. 596 (2005), this Court held that the water district, rather than the individual water users, was the proper party to sue

for water loss resulting from the re-programming of 800,000 acre-feet of Sacramento Delta water from agriculture to fish protection. These amici curiae, too, have already lost water to endangered species—water to which they were entitled under the state law of California and Oregon.

In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), four of these amici (Tulare Lake Basin Water Storage District, Kern County Water Agency, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Storage District) brought suit for a taking of their state-granted water rights when biological opinions issued by federal agencies under the ESA reduced their ability to receive water to which they were entitled from the California State Water Project. Upholding California's right to allocate its water, the court there held:

> [T]he responsibility for water allocation is vested in the State Water Resources Control Board ("SWRCB") [and the California courts], *see* CAL. WATER CODE §§ 174, 179; *California v. United States*, 438 U.S. 645, 693 (1978). Once an allocation has been made – as was done in D-1485 [(the SWRCB's decision establishing a comprehensive water rights scheme balancing the needs of and allocating water rights among competing users)] – that determination defines the scope of plaintiffs' property rights . . . .

Tulare Lake, 49 Fed. Cl. at 322.

Furthermore, the court noted that "plaintiffs' contract rights in the water's use [are] superior to all competing interests," and the "contracts confer on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent

with the terms of the permits issued to the [Department of Water Resources] by the State of California." *Id.* at 318. Holding that "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so," *id.* at 324, the court awarded these amici approximately $25 million for the taking of 297,334 acre-feet of water[2] to which they were entitled under state law. *Tulare Lake Basin Water Storage Dist. v. United States*, 59 Fed. Cl. 246, 266 (2003).

Still pending before the U.S. Court of Federal Claims is *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005), a suit by thirteen amici (Enterprise Irrigation District, Klamath Basin Improvement District, Klamath Drainage District, Klamath Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Co., Pine Grove Irrigation District, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Tulelake Irrigation District, and Westside Improvement District No. 4) that supply water to 1,400 farm families in the Klamath Basin of Oregon and California. At issue in *Klamath* is the water that was to be used to irrigate 176,000 privately owned acres of land in the western portion of the Klamath Project in 2001. Under the authority of the ESA, the Bureau of Reclamation refused to deliver approximately 350,000 acre-feet of this water, which it retained in Klamath Lake for the benefit of three species of endangered fish.[3] Meanwhile, commercial fishermen and

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[2] An acre-foot of water is the volume of water, 43,560 cubic feet, that will cover an area of one acre to a depth of one foot.

[3] Irrigators' direct financial losses from Reclamation's failure to supply water in 2001 have been estimated to be at least $28–35 million. Additionally, "more than two thousand jobs have been lost, farms have lost $74 million in revenue from

others have also sued the United States, claiming that it has failed to provide enough water for the fish. *See, e.g., Pacific Coast Federation of Fishermen's Associations v. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005).

Should this Court endorse the court of appeals' expansionist view of Section 7 without preserving existing state-created water rights, all of the water in the Sacramento Delta, Klamath Basin, and elsewhere would immediately come under federal authority, robbing States of their traditional power over water allocation and dumping the water distribution function upon federal agencies that are ill-equipped to administer it. The result is likely to be chaos in Western water distribution, resulting in shortages, waste, and misallocation by federal officials who have neither the resources nor the experience to allocate and deliver this life-giving resource to those who put it to beneficial use.

II. The Growing Scarcity of Water Makes Future Conflicts with the Endangered Species Act Inevitable

The increase in global populations and the increasing scarcity of water resources world-wide has already introduced conflicts into the mechanisms of water allocation. In the western United States in particular, "[u]rban demands and environmental needs are placing increased pressure on scarce water resources. . . . In addition, the potential for global climate change to reduce water availability in parts of the West is very real." Olen Paul Matthews et al., *Marketing Western Water: Can a Process Based Geographic*

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the cutoff and drought, and the regional economy has suffered losses of $134 million." Julia Muedeking, *Taking the Heart of the Klamath Basin: Is It Free?*, 8 Drake J. Agric. L. 217, 221 (2003).

Information System Improve Reallocation Decisions?, 41 Nat. Resources J. 329, 330 (2001). As the Department of the Interior has recognized, "the demands for water in many basins of the West exceed the available supply even in normal years." Department of the Interior, *Water 2025: Preventing Crises and Conflict in the West* 3 (2005). Simply put, less water means there will be greater conflicts between water users and the government as it attempts to enforce the ESA.

Water scarcity in the West combined with modern pressures on water usage have strained traditional water allocation systems. "The American West is a water-scarce region, with rainfall in many areas west of the one hundredth meridian averaging less than sixteen inches per year (as contrasted to over 40 inches a year in most areas east of the Mississippi River)." C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 Nat. Resources J. 169, 174 (2005). Moreover, "[t]he West's population is growing at the same time that water supplies face continued and new stresses." A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth And Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies*? 27 PUB. LAND & RESOURCES L. REV. 33, 39 (2006). Between 2000 and 2003, seven of the ten fastest growing States in the country were in the West. *Id.* at 40.[4] In order to provide sufficient water for these

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[4] For example, between 1990 and 2000, the population of Nevada increased by an incredible 66.3 percent. U.S. Census Bureau, *Demographic Changes: Population Has Grown Fast in the West, Particularly in the "Public Land States," available at* http://www.doi.gov/water2025/populate.html (last visited Feb. 12, 2007). From 2000 to 2003, its growth jumped another 12.2 percent in just three years. A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth And*

burgeoning populations, cities are looking farther and paying more for water, acquiring water that would have otherwise been used for agricultural purposes. *Id.*

Another major impact on water supplies is climate change. For instance, in California even modest declines in precipitation levels "would have a significant impact because California ecosystems are conditioned to historical precipitation levels and water resources are nearly fully utilized." California Climate Change Center, *Our Changing Climate: Assessing the Risks to California* 3 (2003). Moreover, climate change could lead to higher temperatures in the Sierra Nevada Mountains, where normally water is stored as snow and ice, which as they melt slowly feed rivers and streams. Cal. Climate Change Ctr., *Scenarios of Climate Change in California: An Overview* 14 (2006). "Declining snowpack will aggravate the already overstretched water resources in California. The snowpack in the Sierra Nevada provides natural water storage, equal to about half the storage capacity in California's major human-made reservoirs . . . ." *Id.* at 15. If the snowpack were to disappear, it "could mean more water shortages in the future." *Id.* Furthermore, the "projected changes in water supply would be further exacerbated by increased demand due to warmer temperatures. By the end of century, warmer temperatures are expected to increase the crop demand between 2% and 13%." *Id.* at 16.

Given increasing demands on water resources and probable decreasing supplies, it is inevitable that water "will be more costly, and the trade-offs between growth and its

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Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies? 27 PUB. LAND & RESOURCES L. REV. 33, 40 (2006).

alternatives will become more intense and obvious." 27 Pub. Land & Resources L. Rev at 35. Although water scarcity in the American West is a major problem, water scarcity is also a global problem. As one commentator has noted of what he characterizes as the "world's freshwater crisis":

> The United Nations estimates that if current development trends continue, up to half of the people in the world will suffer from water shortages within the coming twenty-five years. Since much of the world's freshwater is contained in drainage basins that are shared by two or more states, the potential for conflict over this vital resource is obvious.

Stephen C. McCaffrey, *Peaceful Uses of International Rivers*, 97 Am. J. Int'l L. 469 (2003).

In sum, as the Department of the Interior has itself noted, in the future "water supply-related crises will affect economies and resources of national and international importance." *Water 2025* at 3. Playing into this potential future crisis is the conflict between the ESA and water users. As water becomes more scarcer, conflicts between endangered fish and water users will increase.

III. In Interpreting the Endangered Species Act, This Court Should Reaffirm the States' Continued Primacy Over Water Allocation

As this Court has observed, through the history of Western water allocation runs the consistent thread of congressional deference to state water law: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the

consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). This Court has suggested that this federal deference to state water law may have constitutional roots:

> One school of legal commentators held the view that, under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams. In 1903, for example, one leading expert on reclamation and water law observed that "[i]t has heretofore been assumed that the authority of each State in the disposal of the water-supply within its borders was unquestioned and supreme. . . ." Such commentators were not without some support from language in contemporaneous decisions of this Court. Thus, in *Kansas v. Colorado*, 206 U.S. 46 (1907), the Court noted:
>
> > While arid lands are to be found mainly, if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen.
> >
> > * * *
> >
> > [W]hen the States of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other States, and Colorado

> by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation.

California, 438 U.S. at 654–55 (citations omitted).

Whether rooted in constitutional principles or not, from the earliest days of westward expansion Congress has consistently deferred to state and territorial laws and customs regarding water allocation:

> In 1862, Congress opened the public domain to homesteading. Homestead Act of 1862, 12 Stat. 392. And in 1866, Congress for the first time expressly opened the mineral lands of the public domain to exploration and occupation by miners. Mining Act of 1866, ch. 262, 14 Stat. 251. Because of the fear that these Acts might in some way interfere with the water rights and systems that had grown up under state and local law, Congress explicitly recognized and acknowledged the local law:
>
> > [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. § 9, 14 Stat. 253.
>
> * * *

> In 1877, Congress took its first step toward encouraging the reclamation and settlement of the public desert lands in the West and made it clear that such reclamation would generally follow state water law.

California, 438 U.S. at 656–57.

In 1890 and 1891, Congress passed the Act of Aug. 30, 1890, 26 Stat. 391, and the Act of Mar. 3, 1891, 26 Stat. 1101. "The apparent purpose of the 1890 and 1891 Acts was to reserve reservoir sites from settlement but to open them for use in reclamation projects. As before, Congress expressly indicated that the reclamation would be controlled by state water law. . . ." *California*, 438 U.S. at 659–60.

In 1897, Congress passed the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599. The final provision of that Act was proposed as a floor amendment by Representative Cannon "to expressly preserve State's control over reclamation within their borders. It was clearly the opinion of a majority of the Congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution." *California*, 438 U.S. at 661.

Finally, in the Reclamation Act of 1902, Congress "set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western States." *Id.* at 650. In establishing this "blueprint for the orderly development of the West," *Peterson v. Department of the Interior*, 899 F.2d 799, 802-03 (9th Cir. 1990), Congress continued the consistent principle of federal deference to state law: "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675.

Rejecting the United States' claim that subsequent statutes had altered this congressional deference to state primacy in water allocation, this Court left no doubt as to the continued vitality of that principle in approving California's right to place conditions upon a water permit granted to the United States:

> The United States suggests that, even if the Congress of 1902 intended the Secretary of the Interior to comply with state law, more recent legislative enactments have subjected reclamation projects "to a variety of federal policies that leave no room for state controls on the operation of a project or on the choice of uses it will serve." Brief for United States 89. While later Congresses have indeed issued new directives to the Secretary, they have consistently reaffirmed that the Secretary should follow state law in all respects not directly inconsistent with these directives. The Flood Control Act of 1944, 58 Stat. 888, for example, which first authorized the New Melones Dam, provides that it is the "policy of the Congress to recognize the interests and rights of the States in determining the development of watersheds within their borders and likewise their interests and rights in water utilization and control." Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:
>
> "In the arid Western States, for more

> than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> * * *
>
> "Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S.Rep.No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

California, 438 U.S. at 677–79 (footnotes omitted).

Thus, today each State retains the power to determine for itself the legal principles and process by which water allocations will be made. *See, e.g., United States v. Rio Grande Dam & Irrig. Co*, 174 U.S. 690, 703 (1899) ("[A]s to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise."); *Kansas v. Colorado*, 206 U.S. 46, 92 (1907) (federal legislation could not "override state laws in respect to the general subject of reclamation").

In adopting modern pollution legislation, Congress has continued to adhere to this consistent principle of State

primacy in water allocation. *See* Clean Water Act, 33 U.S.C. § 1251(g) (providing "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter"); 33 U.S.C. § 1370 (providing that nothing in the Clean Water Act should "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States"); *see also* Wilderness Act, 16 U.S.C. § 1133(d)(6) ("Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.").

Nothing in the text or the legislative history of the ESA suggests that Congress has deviated from its consistent principle of State primacy in the allocation of water. For instance, Section 4 of the ESA provides for the purchase of water to meet ESA requirements. 16 U.S.C. § 1534 (stating that "to conserve fish . . . which are listed as endangered or threatened species . . . the appropriate Secretary . . . is authorized to acquire . . . waters, or interest therein"). Such a provision would make little sense if the ESA overrode a state's allocation of water.

Moreover, Section 7 of the ESA only encompasses acts of the federal government—there is nothing in that provision that applies it to State governments. Nor should this Court so read it.

CONCLUSION

For all of these reasons, the decision by the court of appeals should be reversed.

Respectfully submitted,

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